UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter Of:

KROGER LIMITED PARTNERSHIP I, MID-ATLANTIC	)	
Respondent,	)	
and	)	**Case No. 05-CA-155160**
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400	)	
Charging Party.	)	

ANSWERING OF UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400 TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Introductory Statement

Charging Party, United Food and Commercial Workers Union, Local 400 (the "Union" or "Local 400"), through its undersigned counsel, submits this answering brief to the Exceptions and Brief filed by Kroger Limited Partnership I, Mid-Atlantic ("Kroger" or the "Respondent") to the decision of Administrative Law Judge ("ALJ") in this matter. The Union submits that the National Labor Relations Board ("Board" or "NLRB") should affirm the Findings of Fact and Conclusions of Law of the ALJ in this matter, since those findings and conclusions are fully supported by the record evidence and the applicable Board law.

The Union filed its original charge in this matter on or about June 30, 2015. After investigation, the Region issued a complaint on December 31, 2015, alleging that Kroger violated Section 8(a)(1) of the National Labor Relation Act (the "Act") by discriminatorily threatening the arrest of and causing the removal of Union representatives who were engaged in

lawful, peaceful, and non-obstructive Section 7 activity in front of a Kroger store in Portsmouth, Virginia.

A hearing was thereafter conducted on March 29, 2016 in Norfolk, Virginia before the Honorable Donna Dawson. After the hearing and briefing, Judge Dawson issued her decision on September 7, 2016, finding that Kroger had discriminatorily enforced its alleged "no-solicitation" rule against the Union representatives. Kroger has now filed its exceptions to that decision.

II. Statement of Facts

The relevant facts in this matter are straightforward and really not in dispute. The Union had represented the employees at Store 538 for some 16 years. Early in 2015, Kroger announced that it was closing its Store 538 in Portsmouth, Virginia (TR. 55-9).[1] Simultaneously, Kroger had recently opened a double-breasted, non-union "Marketplace" store in Portsmouth, not far from the soon-to-be-closed Store 538. Despite the proximity of this Marketplace store, Kroger insisted that the Store 538 employees transfer to the nearest union store, which was some 30 miles away in Yorktown, Virginia (TR. 44). This was an extreme hardship for many employees. In an effort to obtain transfer rights for the 538 employees to the closer Kroger Marketplace store, the Union sought to obtain the support of Store 538's customers for the Union's efforts to compel Kroger to allow Store 538 employees to transfer to the new Marketplace store nearby (GCX. 1; TR. 20-1, 54, 57).

On April 2, 2015, Union representative Brandon Forester ("Forester") was soliciting signatures on a petition requesting that Kroger allows its Store 538 employees to transfer to the new Marketplace store in Portsmouth (GCX. 3). It is undisputed that Forester, in asking the

[1] Joint Exhibits will be designated as ("JX. __"). General Counsel's Exhibits will be designated as ("GCX. __"). Respondent's Exhibits will be designated as ("RX. __"). Transcript references will be designated as ("TR. __").

customers to sign his petition, was at all times peaceful and non-obstructive (TR. 58-61). Despite this, and despite the fact that Kroger had consistently allowed all manner of solicitations at this store by a wide variety of groups over the years, Kroger representatives nevertheless ordered Forester off of the property or the police would be called to remove him (TR. 62-3, 145). When Forester insisted that he had a right to be there, the local police were called to the scene by Kroger Store Manager Donati High ("High") and by Human Resources Director Diego Duran ("Duran") (TR. 63). High and Duran showed Forester a copy of a letter from the landlord of the property, purportedly barring any leafletting or picketing on the property and requiring Kroger to enforce its "no-solicitation" policy (RX. 1). Union representative Heith Fenner ("Fenner"), who was also present at the time Forester was leafletting, was not permitted to examine or make a copy of the letter (TR. 68). After being ordered by the police to depart or face arrest, Forester and Fenner left the premises (TR. 64).

Contrary to Kroger's baseless assertions, the record evidence is uncontroverted that the following solicitations occurred in the area in front of the Kroger Store 538 in Portsmouth:

1. Girl Scouts were present and sold cookies near the front entrance of the store on a regular basis for an extended (two-week) period of time each year (TR. 95);

2. Boy Scouts were also present at the store regularly, again near the front entrance of the store, and sold crafts as well as asked for donations (TR. 96);

3. Lions Club solicitors, who were located by the front entrance of the store, sold brooms and collected eyeglasses (TR. 96-7);

4. Breast cancer awareness volunteers, who were located by the front entrance, set up a table and sold baked goods and breast cancer awareness themed items approximately twice a year around October or springtime (TR. 98);

5. Club promoters would hand out flyers in the Kroger parking lot, put the flyers on customers' car windows and approach customers (TR. 98-100);

6. Red Cross solicitors set up a mobile blood drive in the Kroger parking lot and placed flyers by the time clock in the store to promote the blood drive for a one-day event (TR. 100-1);

7. Salvation Army bell-ringers, who were located by the entrance door, rang a bell and accepted donations between Thanksgiving and Christmas all-day, every day each year (TR. 101-2);

8. College students who sold perfume and encyclopedias, took down people's name/phone number/address and would deliver the product before they went back to college around summer break (TR. 102-3); and,

9. Church group members would approach customers in the Kroger parking lot, asking for donations and handing out flyers to Kroger's customers in the parking lot regarding their church's location and mission (TR. 104).

This list was recited not only by two long-time employees of Store 538 (Laverne Wrenn and Tonja Edwards), but also was confirmed in large part by the Kroger management witnesses themselves. Thus, Donati High, Raymond Helvie, and Timothy Patrick Lynch, current and former store managers at Store 538, all testified to a variety of consistent, prolonged solicitations, both commercial and charitable, by different groups ranging from the Salvation Army to the Girl Scouts to college students selling perfume (TR. 157-8, 164-5, 192-5).

III. Argument

Introduction

Judge Dawson correctly applied well-established Board law and found that, under the Board's ruling in *Sandusky Mall Co.,* 329 NLRB 618 (1999), Kroger was not privileged to exclude peaceful Union representatives who were handbilling the public in the areas in front of the Kroger store. Since Kroger had regularly condoned all manner of other solicitations (commercial and otherwise) in the same area during the past 15 years, Kroger has no argument that it enforced a uniform "beneficent acts" exception, which in any event, is an extremely limited exception. Kroger's argument that it "consistently" enforced a policy prohibiting solicitation is risible in light of the uncontroverted evidence to the contrary, detailed above in this case. Finally, Kroger's "argument" that the Union's actions here were "not Section 7 activities" suggests that Kroger has not reviewed the record evidence in its own case, or that it has an extreme misreading of the law.

A. The Board Should Follow its Long-Standing Precedent with Regard to Discriminatory Solicitation.

As noted above, the Board has consistently adhered to its position that for an Employer to allow certain kinds of solicitation, as in this case, while denying Union representatives access is the essence of discrimination. This principle reaches back all the way to the seminal case in this area, *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 112 (1956). The ALJ correctly noted that the Board has long adhered to this principle. *Salmon Run Shopping Center,* 348 NLRB 658, 662 (2006). *See also Big Y Foods,* 315 NLRB 1083 (1994); *Victory Markets,* 322 NLRB 17 (1996).

In light of the foregoing precedent, the ALJ properly rejected Kroger's argument that the Board should abandon its own standards regarding the very limited "beneficent acts"[2] exception to the general and accepted rule that an employer may not allow solicitations to the public for some groups but deny Union representatives the right to communicate to the very same customers in the very same locations.

Judge Dawson accurately articulated the distinction between: a) the Board's very limited "beneficent acts" exception and b) the much broader unlawful discrimination rule applied by the Board regarding solicitation. (*See ALJ decision, pp. 14; 31-31*). In other words, as set forth in *Wild Oats Community Markets*, 336 NLRB 179 (2001), too many "charitable" incidents over too extended an amount of time constitutes unlawful discrimination. In this case, as the ALJ pointed out, Kroger has permitted the Girl Scouts and the Salvation Army and a host of other groups to solicit for donations and sell items "for weeks at a time each year." (*See ALJ decision, pp. 15; 19-20*). Furthermore, "this does not even include the other months throughout the year that Respondent authorized many other groups to solicit each month or so." (*See ALJ decision, pp. 15; 20-21*).

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[2] Although almost 35 years ago the Board created a very narrow exception for a few "beneficent acts" of solicitation to occur without running afoul of the normal discrimination analysis, the Board will find discrimination where the incidents of charitable solicitation occur frequently and over an extended period of time. *See Be-Lo Stores,* 318 NLRB 1, 11 (1995); *see also Albertson's Inc.,* 332 NLRB 1132 (2000). (See discussion, *infra.*) There is no dispute here that in prohibiting nonemployee UFCW Local 400 representatives from engaging in protected activity in areas outside its stores, Respondent singled out the Union from the myriad of other groups which it permitted to solicit on its property continually and regularly for over 15 years. The record in this case clearly establishes that the alleged "beneficent acts" allowed by Respondent at its stores are extensive and not isolated, and the record is clear that not all the solicitations were even charitable. Consequently, Respondent's denial of access and threats of arrest to representatives of UFCW Local 400 engaged in protected union solicitation and distribution activities, in areas outside of its Store 538 on April 2, 2015, clearly violated Section 8(a)(1) of the Act. *See Albertson's Inc.,* 332 NLRB 1132 (2000); *see also Sandusky Mall Co.,* 329 NLRB 618 (1999).

B. The Union Representatives Were Engaged in Activity Protected by Section 7 of the Act.

In accordance with well-established Board law and Act precedent, peaceful handbilling is "*clearly*" protected under Section 7 of the Act. (S*ee ALJ decision, pp. 11; 3-4*) (emphasis added). Here, Kroger's argument, that the Union's activity was not protected because the Union was not exercising "organizational rights," is completely frivolous. As the ALJ articulated, this was a case where the Union was simply communicating with the public concerning a bona fide labor dispute. (S*ee ALJ decision, pp. 11; 1-3*). In fact, the Union representatives were engaged in textbook protected activity (acting in support of employees.) As noted (again, correctly) by the ALJ:

> No matter which of these forms it might take, it is clearly protected under Section 7 of the Act. *Glendale Associates, Ltd.*, 335 NLRB 27 (2001), citing *Oakland Mall*, 316 NLRB 1160, 1163 fn. 14 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996). Here, Forester, a nonemployee union representative, solicited potential customers of Respondent in the shopping center parking lot. There is no doubt that Forester did so on behalf of the Union, and the employees it represented, in protest of Respondent's decision not to transfer Kroger 538 employees to the new Kroger Marketplace stores, and to garner support for the Union's efforts in that regard.

ALJ decision, pp. 11; 3-10.

While arguing to the contrary, Kroger all but admits that the Union's goal was to communicate with the public regarding a labor dispute. Even according to Kroger, the Union wanted to "express displeasure with a particular aspect of the bargaining relationship between Kroger and its employees." (*See Kroger Brief in Support if Its Exceptions; pp. 16*). If this does not fall within the Board's broad definition of labor disputes, then nothing does. Section 2(9) of the Act defines a labor dispute as:

> [A]ny controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment,

> regardless of whether the disputants stand in the proximate relation of employer and employee. *See also Sw. Reg'l Council of Carpenters*, 356 NLRB 613 (2011).

Nonetheless, Kroger seems to argue (without citation to authority) that the Union's activity was somehow unprotected because the Union was "attempting to harm the company's business." (*See Kroger Brief in Support if Its Exceptions; pp. 16*). Again, the peaceful handbilling here was no more than a routine and peaceful appeal to the public to enlist its support in a labor dispute. The truth is that the Union was asking Kroger (through an appeal its customers) to do the right thing and allow employees represented by the Union to transfer to a closer Kroger store now that this store was closing. Kroger's argument on this point is fantasy, pure and simple.

C. Kroger's Attempted Distinction Regarding "Unauthorized" Solicitation is Unavailing.

Again, the ALJ correctly rejected Kroger's novel (and curious) argument that, since alleged unauthorized groups "always" left when they were told to, this was the very first time in recorded history that a group (the Union) had refused to leave the area in front of Kroger's store when told to by management. As noted by the ALJ, whether in fact Kroger told other unauthorized groups to leave is irrelevant. The facts are undisputed that Kroger consistently allowed a wide range of solicitations and the ALJ notes, that "there is no distinction before the Board between union activity and beneficent acts." *See ALJ decision, pp.15; 38.*

D. Kroger's Attempted "Beneficent Acts" Justification for its Discriminatory Enforcement of a No-Solicitation Policy Fails.

As noted above, Kroger allowed various organizations, both charitable and commercial, to have regular and frequent access to the immediate exterior of Store 538 year after year. In no way can this high volume of solicitation activity (admitted by Kroger's witnesses) be defined as "occasional" or "sporadic." The record in this case clearly establishes that the alleged "beneficent acts" allowed by Respondent at its stores were extensive and not "isolated," and the

record is just as clear that not all the solicitations were charitable. *See Wild Oats, supra.* Under any circumstances or standards, the frequency and volume of solicitations permitted by Kroger at Store 538 require a finding of discrimination based on the Union's message. Therefore, Kroger's "occasional" solicitation argument should be rejected out of hand.[3]

In this regard, the Union would invite the Board to overrule its limited holding in *Hammary Mft. Corp.*, 265 NLRB 57 fn. 4 (1982), which allowed the Board to examine the "quantum of incidents" of charitable solicitation involved in a particular case to determine whether unlawful discrimination has occurred. The Union submits that this totally subjective test is unworkable, unnecessary, and unrelated to the task at hand, i.e., a finding of discrimination. That is, the Board does not require that the Union show a certain "quantum of incidents" before it finds discrimination in discipline or other contexts, and it should not in solicitation cases. The Union would note that, even as early as *Babcock & Wilcox*, 351 U.S. 105, 112 (1956), the underpinning of any rule regarding the exclusion of non-employees is in significant part a function of the Board's regard for employer property which is not generally open to the public and which the employer wishes to maintain as private for purposes of conducting its business. But that rationale falls away to a great degree (if not completely) in a retail store/shopping center setting such as this one. And that rationale falls even farther away when the employer allows all manner of solicitation, both charitable and commercial, but enforces an alleged "no-solicitation"

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[3] As the Board held (adopting the ALJ's Decision) in *Strack and Van Til Supermarkets*, 340 NLRB 1410, 1436 (2004):

> Here, Strack permitted others to solicit inside, and in front of, Town & Country stores at Portage and Valparaiso in 1998, before and after the July and August dates, when it caused the police to remove UFCW pickets and handbillers from the fronts of those stores and caused Jeff Kimbrough's arrest for picketing in front of the Portage store. Strack's liberal attitude toward solicitations by newspapers, AT&T, charitable organizations and other community causes is shown by the solicitation calendars which those stores, respectively, maintained for that year. The frequency and broad spectrum of permitted activities far exceeds the "tolerance of isolated beneficent solicitation" that the Board might regard as narrow exceptions to an otherwise valid, nondiscriminatory no-solicitation policy.

rule selectively against the Union. Solicitation is solicitation, "beneficent" or not, whether it is conducted once or twice or 15 times. And allowing the use of common areas by a multitude of causes, excluding only the Union, is the textbook definition of discriminatory conduct.

IV. Conclusion

For all the foregoing reasons, the Union urges the Board to adopt Judge Dawson's well-reasoned decision in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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